Supreme Court, U.S.
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No. 01-62

In The

Supreme Court of the United States

CHESTER COX, JR.; et al.,

Petitioners,

v.

CITY OF WICHITA FALLS, TEXAS,
A Texas Incorporated Municipality;
UNITED STATES OF AMERICA; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT CITY OF WICHITA FALLS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does a municipal zoning ordinance that is not comprehensive and is not adopted in accordance with a comprehensive plan violate the due process and equal protection clauses of the United States Constitution?

LIST OF PARTIES

Petitioners: Chester Cox, Jr.; D.B. Clark; Pauline Clark; Steve Murphy; Robin Murphy; Paul Brown; Agnes Brown; Eddie Long; William Bradley; Dorothy Bradley; Melvin Masters; Glynn C. Weeks; Madeline A. Weeks; Billie Wolfe; Robbie Wolfe; Edwin L. Smith; Wanda Smith; Everett Davis; Herb Sleeper; Joanie Sleeper; Kenneth Davis; Vona Davis; Roy L. Baker; Sammie J. Baker; David Homyk; Marsha Homyk; Jo Ann Gibson; Burt Stewart; Raymond M. Heinert; James Prentiss; Vinnie Prentiss; Billy Davis; Sylvia Davis; Francis Raines; Joe Davis; J.A. Hill; Joe Mitchell; Lois Mitchell; Dan Humphreys; Marilyn Humphreys; Joe Wilson; Bobby Mannen; R. E. Marlow, Jr.; Susan Woods; Larry Woods; Gad Garland; Kathleen Murphy; Truman J. Stephens; Valine Stephens; Michael Owen; Ernest Davis; Mary Davis; and Larry Rutledge.

Respondents: City of Wichita Falls, Texas; United States of America; United States Department of Defense; William H. Perry, as Secretary of the Department of Defense; United States Department of the Air Force; Sheila Widnall, as Secretary of the Department of the Air Force; Sheppard Air Force Base; and General Michael Zettler, as Base Commander of Sheppard Air Force Base.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING THE WRIT 1

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

St. Luke's Hosp. v. Agber, 952 S.W.2d 503 (Tex. 1997) 4

STATUTES

Texas Local Government Code, Chapter 241.....1, 4

Texas Local Government Code, Section 241.003..... 4

Texas Local Government Code, Section 241.015.....5, 6

Texas Local Government Code, Section 241.018.....4, 5

OTHER AUTHORITIES

City of Wichita Falls Ordinance 155-94..... 2

City of Wichita Falls Ordinance 2409.....1, 2

REASONS FOR DENYING THE WRIT

Respondent respectfully requests that the Court deny the petition for writ of certiorari. The District Court correctly concluded Respondent's ordinance complied with the requirements of Chapter 241 of the Texas Local Government Code and was not facially violative of the due process and equal protection clauses of the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated April 9, 2001 is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Wichita Falls Division, dated September 1, 1999 granting summary judgment to Respondent, is reprinted at page 2 of the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The City of Wichita Falls ("City") is a Texas home rule municipality with a population of approximately 107,000. In 1968, the City first adopted airport zoning regulations by the passage and approval of Ordinance No. 2409. This ordinance was titled "AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH,

AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF SHEPPPARD AIR FORCE BASE BY CREATING AIRPORT APPROACH ZONES, TRANSITION ZONES, HORIZONTAL ZONE AND CONICAL ZONE, AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE SHEPPARD AIR FORCE BASE, AIRPORT ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES." Ordinance 2409 was subsequently amended in 1974, 1982, and finally in 1994 by the passage of Ordinance 155-94 (the "Ordinance"). The Ordinance was enacted by the Wichita Falls City Council December 20, 1994 after receipt of a report from the City's Airport Zoning Board (Pet. App. A-46). The purposes of the Ordinance are contained in Section 6405 of the Ordinance.

"6405 PURPOSE

> The purpose of the Airport Zoning provision is to ensure protection of the utility of Sheppard Air Force Base/Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport where it has been determined that Sheppard Air Force Base is an essential part of the City and surrounding cities and counties.
>
> It is also the purpose of this provision to protect the health, safety, and general welfare of

> the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity of Sheppard Air Force Base/Wichita Falls Municipal Airport."

On July 1, 1996, Petitioners filed suit against the City seeking a declaratory judgment that the Ordinance was an improper use of the City's police power and was facially violative of the due process and equal protection clauses of the United States and Texas Constitutions because the Ordinance was not adopted in accordance with a comprehensive plan. The suit also asserted various claims against the United States of America and other federal defendants.

On September 1, 1999 by Memorandum Opinion and Order, the District Court granted summary judgment to the City and all other defendants (Pet. App. A-2). On November 2, 1999, Petitioners filed a Motion for Relief from Judgment, for Leave to Amend the Complaint, and to add the State of Texas as a Party. This motion was denied by the District Court (Pet. App. A-23).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On April 2, 2001, the Court of Appeals affirmed without opinion (Pet. App. A-1).

ARGUMENT

A comprehensive plan is not a requirement for airport zoning regulations enacted under Chapter 241 of the TEXAS LOCAL GOVERNMENT CODE.

The Ordinance was enacted pursuant to the statutory authority granted under Chapter 241 of the Texas Local Government Code. Petitioners accepted, without challenge, the constitutionality of this authority (Pet. App. A-9 n.5). Chapter 241 is clear in its requirements and was properly interpreted and enforced according to the express language of the statute. *St. Luke's Hosp. v. Agber*, 952 S.W.2d 503, 505 (Tex. 1997). Because of the geographical limitations contained in the statute a comprehensive plan is not required or even possible.[1] The requirements for the City's ordinance are contained in Section 241.018:

> § 241.018 Reasonableness of Airport Regulations
>
> (a) An airport zoning regulation must be reasonable and may impose a requirement or restriction only if the requirement or restriction is reasonably necessary to achieve the purposes of this chapter.
>
> (b) In determining which airport zoning regulations to adopt, the governing

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[1] Airport land use regulations are limited to the "controlled compatible land use area" which is defined in Section 241.003 of the Texas Local Government Code as "an area of land outside airport boundaries and within a rectangle bounded by lines located no farther that 1½ statute miles from the centerline of an instrument or primary runway and lines located no farther than five statute miles from each end of the paved surface of an instrument or primary runway."

> body of a political subdivision or a joint airport zoning board shall consider, among other things:
>
> (1) The character of the flying operations expected to be conducted at the airport;
>
> (2) The nature of the terrain within the airport hazard area;
>
> (3) The character of the neighborhood; and
>
> (4) The current and possible uses of the property to be zoned.

There is no evidence nor is it argued by Petitioners that Respondent's ordinance fails to comply with the reasonableness requirement of Section 241.018.

The only mention of the term "comprehensive plan" in Chapter 241 is contained in Section 241.015:

> § 241.015 Incorporation of Airport Zoning Regulation Into Comprehensive Zoning Ordinance.
>
> A political subdivision **may** (emphasis added) incorporate an airport zoning regulation in a comprehensive zoning ordinance and administer and enforce it in connection with the administration and enforcement of the comprehensive zoning ordinance if:
>
> (1) the two zoning regulations apply, in whole or in part, to the same area; and
>
> (2) the comprehensive zoning ordinance includes, among other matters, a regulation on the height of buildings.

The District Court properly concluded, "If the Legislature had intended a comprehensive plan to be a requirement for airport zoning, it would have identified such a requirement in the statute (Section 241.015), which it did not do. Therefore, the fact that the Ordinance was not adopted in accordance with a comprehensive plan does not render the Ordinance to be unconstitutional." (Pet. App. A-10-11)

CONCLUSION

The decision of the District Court as affirmed by the Court of Appeals creates no conflict with this Court, the courts of other circuits or other states. Judgment for respondent was dictated by the clear statutory language of the enabling authority which remained unchallenged by the Petitioners. The petition for writ should be denied.

Respectfully submitted,

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August 2001